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THE CLIENT FRAUD PROBLEM AS A JUSTINIAN QUARTET: AN EXTENDED ANALYSIS

*Geoffrey C. Hazard, Jr.**

I. INTRODUCTION

In Lawrence Durrell's *Alexandria Quartet*,¹ the author presents four narratives of a series of events about residents of Alexandria. The reader becomes aware, quickly or slowly, that the narratives address the same events. Yet Durrell never provides us with an external or objective viewpoint of these events. Hence, we can only surmise what "really" happened to the protagonists.

Essentially, the same epistemological point is made in a Pirandello play.² This term originally referred to the eponymous author of a specific work of theatre art. It now generically refers to the fact that various participants in a transaction view the events differently, interpret the events differently as they occur, remember them differently, and place different weights on the subsidiary incidents of the transaction. They also integrate the remembrance differently into their self-conception or "identity." The same point is made in *Rashomon*,³ the Japanese play in

* Director, American Law Institute; Trustee Professor of Law, University of Pennsylvania Law School; B.A., Swarthmore College, 1953; LL.B., Columbia Law School, 1954.

1. A group of four novels written and meant to be judged as one work. See LAWRENCE DURRELL, *BALTHAZAR* (1958); LAWRENCE DURRELL, *CLEA* (1960); LAWRENCE DURRELL, *JUSTINE* (1957); LAWRENCE DURRELL, *MOUNTOLIVE* (1958).

2. See LUIGI PIRANDELLO, *RIGHT YOU ARE* (Eric Bentley ed., 1954).

3. See RYUNOSUKE AKUTAGAWA, *RASHOMON AND OTHER STORIES* (Takashi Kojima trans., 1952).

which the same transaction is enacted serially from the respective viewpoints of the participants. One could say that Picasso makes the same point in his post-blue period "abstract" paintings.⁴

If art can instruct us, we, the critics and caretakers of the law, can learn from these performances. I will take as my point of departure that Durrell, Pirandello, Akutagawa, and Picasso are correct. That is, what a person sees and understands is dependent upon the viewpoint established through his or her past experience and present position. Indeed, it would be a foolhardy lawyer who supposes otherwise. A lawyer's professional work is constantly and unavoidably concerned with problems resulting from the fact that participants in transactions understand transactions differently, often very differently. My inquiry concerns the application of this insight to the work of lawyers themselves.

I also bring to mind that the Emperor Justin is the classic patron of the legal art. The Justinian Code, promulgated in the sixth century A.D. under the Emperor's authority, is the model of all law giving. The eternal hope of law reformers, at least in the Western tradition, is to replicate the presumed virtues of the Justinian Code—a comprehensive, internally consistent statement of legal rules having universal application, cast in language comprehensible to the average citizen, and impervious to the corrupting power of professional lawyers and judges.

My undertaking will address the rules governing the practice of law in the technique of the *Alexandria Quartet*. The basic point is that the rules governing the practice of law have a different appearance according to various professional viewpoints.⁵ I will consider four such viewpoints: the advocate, the judge, the legal counselor, and the legislator. In imitation of Durrell, I will suggest that these rules constitute not a single legal text, but a Justinian quartet, hence the title of the Article.

II. THE LEGAL PROBLEM

The specific legal problem is whether and under what circumstances a lawyer may or must take action to interdict or remedy client fraud. In

4. See generally WILHELM BOECK & JAIME SABARTÉS, *PICASSO* (Milton S. Fox ed., 1955); THE MUSEUM OF MODERN ART, *PABLO PICASSO: A RETROSPECTIVE* (William Rubin ed., 1980).

5. The theme can be considered an extension of articles written by my colleague, Professor Koniak. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992). The idea that social phenomena appear different to persons differently situated is, of course, a very old one. I am informed that Chinese philosophy regards any other view—that is, that social phenomena *could* have a single aspect—as a patent absurdity.

the common parlance of the legal profession, this is the problem of "whistle-blowing."⁶

The problem of fraud arises in endless variations including misrepresentations before a court;⁷ misrepresentations in transactions concerning real or personal property—whether selling the property or effecting a mortgage or marketing an issue of stock or other security;⁸ misrepresentations in inducing people to put their savings in an unsound depository institution or to become shareholders in an unsound company;⁹ and misrepresentations to colleagues or superiors by a corporate official.¹⁰

Misrepresentation in violation of the law can run from bare-faced, full-fledged lies to failure to make disclosure of material facts or providing less than all the facts in a misleading way. What constitutes misrepresentation in any given situation depends in part on the governing law. For example, the rules of disclosure in securities markets are more exacting than those in a public auction of used automobiles. Thus, laws external to the rules of professional conduct usually provide the definitive standard for a specific transaction. Only New Jersey's Rules of Professional Conduct impose on lawyers an affirmative duty to disclose fraud

6. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 294-323, 776-96 (2d ed. 1994), and the sources cited therein for an extensive list of literature on this subject. The judicial decisions have been relatively few. *See, e.g.*, *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974); *In re American Continental Corp.*, 794 F. Supp. 1424 (D. Ariz. 1992). A recent endeavor to deal with the subject, only partially successful in my view, is the ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992). *See* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993).

7. *See, e.g.*, *Nix v. Whiteside*, 475 U.S. 157, 174-75 (1986) (holding that an attorney acted properly by threatening a client with withdrawal if the client presented perjured testimony).

8. *See, e.g.*, *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1562, 1565 (7th Cir. 1987) (holding that the attorney falsely represented that he had conducted a search revealing the absence of liens on property, breached his duty of care, and was liable for negligent misrepresentation where the lender detrimentally relied on that misinformation); *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964) (holding that the evidence was sufficient to establish that the auditor who prepared "pro forma" statements had actual knowledge of the falsity of such reports and deliberately conspired to defraud investors).

9. *See, e.g.*, *American Continental Corp.*, 794 F. Supp. at 1442 (holding that an "independent public accountant who knows of or recklessly disregards a client's fraud may be held liable for aiding and abetting that fraud where the auditor provides services which constitute substantial assistance").

10. *Cf. O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 83 (1994) (stating that state law governs the imputation of corporate officers' knowledge to a corporation that is asserting claims created by state law).

going beyond that which ordinarily arises from participation in a transaction.¹¹

It is a sad but not a novel fact that in financial transactions some clients are inclined to create unsubstantiated expectations in transactions involving money. The reason, of course, is that there is money to be made by doing so. When the unsubstantiated expectation is material and reliance by the victim is not unreasonable in the circumstances, making money this way is always tortious. These days, given the broad definitions of mail fraud,¹² securities fraud,¹³ and the RICO statute, the conduct is usually also criminal.¹⁴ By definition, there is always an innocent victim, or a relatively innocent victim. The victim, if and when he discovers that he has been taken, usually will want the law to do something about the matter.

Fraud or alleged fraud poses a variety of legal issues. One such issue is whether the victim's disappointed expectations are indeed the product of fraud or merely the result of market perturbations. Another issue is whether the immediate actor has the requisite intent. Yet another issue is whether other people might be found to have been complicit in the transaction in one way or another.

The issue of third party complicity attracts attention on legal and moral grounds. A principle of equality holds that all members of a gang of thieves should be brought to book. More than this, however, the issue attracts attention because of the inherent need to effect redress, that is, making the victims whole or at least reducing their losses.

Part of the ill-gotten gains of a financial fraud usually will have been spent long before the fraud is discovered. If the transaction is drawn into legal question, resolving the legal issues will usually be very expensive. Since even those who commit fraud have an aversion to

11. See NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1984).

12. See, e.g., Peter J. Henning, *Maybe it Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) ("The broad reach of the mail fraud statute . . . has been attributed to the willingness of courts to impose few restrictions on the application of the 'scheme and artifice to defraud' element of the crime.").

13. See, e.g., William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 980 (1987) ("Congress and the courts . . . [are] adhering to a liberal and flexible construction of the federal securities laws As the definition of securities fraud expands to include new claims based upon regulatory legislation, the moral taint associated with its assertion attenuates.").

14. See James E. Spiotto & James M. Breen, *RICO: The Potential Applicability of RICO to Public Debt Litigation*, in THE PROBLEMS OF INDENTURE TRUSTEES AND BONDHOLDERS 1991: DEFAULTED BONDS AND BANKRUPTCY 569, 584 (PLI Real Estate Law Practice Course Handbook Series No. 366, 1991).

prison, they are willing to spend their last penny—which originally may have been a victim's penny—in trying to stay out of jail. Sometimes, as in the case of the recent debacle in the New Era Philanthropy case,¹⁵ the bankruptcy will divide the diminished fund among the victims, a procedure that itself will further diminish the fund. For these and other reasons, the immediate fraud-doers usually have insufficient assets to cover the victim's losses.

This practical consideration makes more insistent the inquiry whether there was complicity on the part of others in the underlying transaction. Transactions of greater than ordinary complexity will necessarily involve other players, such as accountants, underwriters, other financial advisers, and perhaps, a title insurance company.¹⁶ Their participation is necessary on technical grounds. For example, only a technical specialist, such as an accountant, can competently assess the details of an entity's financial condition; only an underwriter can adequately assess the element of rational risk in a venture. These third parties also lend credibility to a venture that the investors are ordinarily less familiar with than the entrepreneur and the lawyer. As Judge Henry Friendly remarked in a leading case dealing with complicity of professionals in a securities fraud, "[i]n our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."¹⁷

In the now current phrase, the third party professionals are "gatekeepers."¹⁸ In other words, reputable professionals will not lend their assistance to, and thereby enhance the credibility of, legally improper enterprises.¹⁹ Without third party professional assistance, the entrepreneur cannot come through the gates of the city into the marketplace.

The third parties are not professional police. To the contrary, their vocation is to assist transactions, not to obstruct them. Nevertheless, various considerations induce these professionals to serve in effect as

15. See Joseph A. Slobodzian, *It's a New Era for the Fund's Fallen Chief*, NAT'L L.J., July 3, 1995, at A12.

16. See Timothy M. Metzger, Comment, *Abandoning Accountants' Liability for Aiding and Abetting 10b-5 Securities Fraud*, 87 NW. U. L. REV. 1374, 1395 (1993) ("[M]ost securities transactions require the assistance of many collateral participants, such as accountants, brokers, and underwriters.").

17. *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964).

18. See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 890 (1984).

19. See *id.* at 891.

market police: moral revulsion at being involved in a legally tainted transaction; personal embarrassment upon having failed to detect the character of such a transaction; concern for business or professional reputation; economically rational recognition that even a large fee is not worth the eventual cost of being implicated in a tainted transaction; dread at criminal liability and fear of civil liability; and high anxiety at even the prospect of becoming legally involved.²⁰ As has often been observed, contemporary American legal process is itself viewed as a punishment.²¹

The legal problem in these circumstances is to differentiate between assistance by the professionals that is legitimate and assistance that is not. The legal problem arising with lawyers and clients is simply a special case of this more general problem. Some lawyers, anxious about being held accountable under the law, appear unwilling to appreciate that the problem concerns other types of gatekeepers as well. They imagine that they alone are being put to the task of ascertaining whether a client is engaged in optimistic entrepreneurship or bent on fraud. Lawyers who hold that supposition might confer with their colleagues in the accounting profession.

It is commonly understood that even one who commits fraud is entitled to legal assistance in defending and even defeating a criminal prosecution. For similar, although less compelling reasons, a defrauder is also entitled to resist efforts by victims to obtain civil redress. For even less compelling reasons, it is generally agreed that a client who wishes to pursue a transaction to the limits of the law may engage legal assistance in the undertaking. However, it is also commonly understood that not even a lawyer may knowingly assist a defrauder in carrying out a fraudulent scheme.

The basic legal problem is to differentiate between innocence and complicity in terms of substantive legal criteria that do not, through overbreadth, threaten legitimate lawyer assistance in risky transactions. A related legal problem is to define exceptions to the rules of attorney-client confidentiality that will correspond to this substantive distinction.

20. *See id.*

21. *See* Laura Kalman, *Bleak House*, 84 GEO. L.J. 2245, 2252 (1996) (reviewing JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995)).

III. RETURNING TO ALEXANDRIA

Even the statement of this legal problem has enmeshed us in the problem of multiple viewpoints. At minimum, the client has a viewpoint of the transaction that is different from that of the lawyer. When the client is a corporate entity, there are other participants as well—corporate officers and directors who speak on behalf of the client but are not, strictly speaking, clients.²² These people all have their own viewpoints, including fear of being personally charged with complicity if the transaction is later questioned at law. The other relevant professionals—accountants, financial advisers, etc.—have different viewpoints as well.

At this stage it is useful to step back and make a more general point. This has to do with a standard method of legal analysis, the hypothetical case. Every lawyer has been taught through this method, whether the hypothetical is in the form of appellate cases (as in the traditional casebook) or a “problem” (as is now in vogue). Every legal argument is predicated on an assumed state of facts. Every legal opinion is similarly predicated. Every judicial decision—trial or appellate—proceeds on the same basis. Indeed, given the nature of legal reasoning, it could not be otherwise. Legal reasoning mediates between general categories and specific instances and addresses the question whether a given instance does or does not properly come within the terms of a general category. Without specification of an instance, a legal issue cannot be stated, let alone resolved.

Durrell would remind us what practicing lawyers know; that is, that specified facts do not exist in real life. The hypotheticals that were the means of our professional indoctrination and essential in legal technique are incomplete portrayals of reality. Rather, the players in the games of real life all have different understandings of what is happening in a transaction, different subsequent retrospections of what happened, and different interpretations of the significance of the event for their continuing lives. The law’s hypotheticals are profoundly misleading if mistaken for reality.

In human terms (and law is, above all, concerned with human terms) there are as many significant realities as there are significant players. My theme will be to develop this proposition by considering the problem of

22. See Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 16 (1987).

client fraud from the four legal viewpoints that have been identified.

IV. THE ADVOCATE

An advocate is never retained by a defrauder; he is retained only by alleged defrauders. The client represented by an advocate is legally guilty of criminal fraud only if found to be so through the process of criminal justice, and is liable for civil fraud only through the counterpart process of civil justice. Until that point, the client is legally innocent. For the advocate, the client's state of legal innocence is the equivalent of true innocence. By "true innocence" I mean the discerning judgment of an Omniscient Intelligence. That Intelligence exists for those of us who believe in God, but otherwise exists only in legal hypotheticals and the mind of the general public.²³

There are constraints on what an advocate may do for a legally innocent client who is accused of fraud. The advocate may not make misrepresentations to the court concerning either the merits or procedural matters; nor unjustifiably stall a proceeding or lie to opposing counsel; nor present evidence, whether testimony or documentary, that he knows is perjured; nor fail when necessary to counsel the client and other witnesses not to lie.²⁴ An advocate has a right to refuse to present evidence that he reasonably believes is false.²⁵ When an advocate discovers that he has presented evidence that he knows is false, he is required in most jurisdictions to take appropriate remedial measures.²⁶

The matter of remedial measures is, of course, the point of tension in the advocate's conflicting duties: those owed to the client and those owed to the court. The advocate's duty to the client is that of loyalty, often referred to as "complete loyalty."²⁷ The corollary duty to the client is to maintain the client's confidences, often referred to as a duty to maintain the confidences inviolate.²⁸ The advocate's duty to the court is that of candor, often referred to as one of "complete candor."²⁹

23. See MARVIN E. FRANKEL, *PARTISAN JUSTICE* 27-28 (1980).

24. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-4 (1992).

25. See *id.* Rule 3.3(c).

26. See *id.* Rule 3.3(a)(4).

27. See *Burger v. Kemp*, 483 U.S. 776, 784 (1987) ("[W]e generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client.').

28. See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (West 1990) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence . . . of his or her client.').

29. See Christopher E. Dominguez, Note, *Congressional Response to Hubbard v. United States: Restoring the Scope of 18 U.S.C. § 1001 and Codifying the "Judicial Function" Exception*, 46 CATH. U. L. REV. 523, 553 n.206 (1997) ("Rule 3.3 requires complete candor from the attorney to

Stated as a general principle, these duties are inherently incompatible. It is impossible for an advocate to be completely loyal to a client and entirely candid with the court. The advocate's very function is that of go-between from the client to the court, carefully controlling what the court will learn about what the client knows. Statements cast in terms of "complete loyalty" and "complete candor" must be regarded as hortatory, hypocrisy, or simply nonsense.

The crucial issue for the advocate, therefore, is the proper course of action upon discovering that evidence he has presented consists of perjury or fabricated documents. This question cannot be resolved as a matter of principle. As a matter of principle, it is agreed that an advocate must be both loyal to the client and candid with the court. Since these governing principles are incompatible, the crucial question—what the advocate must do—must be resolved by positive law, that is, the rules specifying the advocate's protocol under such circumstances. The rule must necessarily compromise one principle or the other.

The appropriate terms for the advocate's protocol remain a matter of dispute and ambiguity in various circles in the bench and bar. Many judges hold that the lawyer must disclose the perjury or fabrication to the court.³⁰ Many academicians and some lawyers agree with that position. Some academicians and lawyers take the view that the duty to the client should prevail, so that the advocate's duty to the court is fulfilled when the client has been told to tell the truth.³¹

For most practicing advocates, however, the matter is moot because, as they report, they have never encountered such a situation. In the experience of these advocates, there are only two real life eventualities: either the client does not take the stand, or the client, upon taking the stand, gives testimony that the lawyer did not know was false.³² In criminal cases, the client can avoid the stand under the protection of the Fifth Amendment. In civil cases, the client can avoid the stand by settling the case. In either event, the reason the client does not take the stand is ordinarily that counsel considered that the client's testimony

the court.").

30. See, e.g., Florida Bar re Amendments to the Rules Regulating the Florida Bar, 557 So. 2d 1368, 1370 (Fla. 1990) ("Upon ascertaining that material evidence is false . . . if it has been offered . . . its false character should immediately be disclosed.").

31. Compare *Nix v. Whiteside*, 475 U.S. 157 (1986), with Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988).

32. For a general discussion of information control and professional control and ethics, see KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 240-50 (1985).

could be fatally damaging.

Decisions as to whether or not a client will testify are reached by the attorney undertaking a transposition of viewpoint. The lawyer temporarily changes his or her approach to the testimony from that of the client's partisan advocate into that of the trier of fact in order to assess whether the client's testimony will be believable. Advocates know that triers of fact are notoriously unsympathetic to witnesses who lie on the stand. They also know that such lack of sympathy readily translates into a harsh verdict. Thus, acting as the client's loyal adviser, the advocate seeks to spare the client such an outcome.

From the viewpoint of a practicing advocate, ethical obligations and prudential considerations tend to merge. If the client's testimony will be regarded by the trier of fact as evidently false, that is a good prudential reason not to present the testimony. If the client's testimony has a reasonable chance of being believed, then why should the advocate have to say whether he himself believes the testimony? The advocate thus finds moral direction in the wisdom of the *Alexandria Quartet*.³³ The difficult practical problem for an advocate is how to persuade a client that his testimony is unbelievable, and that accordingly, it would be imprudent for the client to give the testimony. This is a problem that goes beyond the scope of the present inquiry. Whether the law should try to demand more of an advocate poses a legislative question to which we will come presently.

V. THE JUDGE

The most penetrating expositions of the judge's viewpoint of legal process is Marvin Frankel's *Partisan Justice*³⁴ and his predecessor paper, *The Search for Truth: An Umpireal View*.³⁵

Analysis begins with recognition of the responsibility of a judge and of the jury in a jury-tried case. That responsibility is to impose a just result on parties whose capacity to understand justice has been severely impaired by their partisan interest in the immediate controversy. To this end, the judge wants to find out what really happened in the transaction because assessment of right and wrong requires a fact predicate on which to proceed. However, as Judge Frankel explains (with most trial judges

33. See discussion *supra* Parts I, III.

34. FRANKEL, *supra* note 23.

35. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

nodding in agreement), the presentations at trial are at best approximations of truth from which the tribunal must extrapolate a factual predicate.

The problem of client fraud in the trial setting is simply a special case of the general problem of fraud with which judges and juries must deal. However, alleged fraud can also arise in the course of an adjudication through the presentation of forged documents, the subornation of witness perjury, or the presentation of perjury by a party. These aspects are often interrelated because the trial of a case of alleged substantive fraud often proceeds with false testimony, forged documents, or fabricated real evidence other than documents.

Naturally, presentation of deliberately falsified evidence is of special concern to judges. Presentation of such evidence is an attempt to subvert the process for which judges have special responsibility. Many judges hold that under all circumstances advocates must perform the role of gatekeeper.³⁶ Accordingly, they prohibit the advocate from offering testimony or other proof that counsel knows to be false, even the client's testimony which the client insists on presenting.³⁷ Further, these judges assume that an advocate can identify client perjury. This assumption is surely warranted in situations where counsel knows that the client is lying, i.e., where the client changes the story that the client himself has given to counsel, or where counsel has personal knowledge of the crucial facts.³⁸ A few judges have gone even further—quite improperly in my view—in imposing gatekeeping responsibility on an advocate concerning false testimony by opposing parties or adverse witnesses.³⁹

On the other hand, many judges show strong sympathy for an advocate whose client wants to commit perjury in a criminal case.⁴⁰ The basis of this solicitude is not often articulated. However, the inference is that these judges believe that the game of trying to compel counsel to be a gatekeeper in this context is not worth the candle of the additional light of truth that could be achieved. The advocate's knowledge of whether the

36. See *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964) (Friendly, J.); Kraakman, *supra* note 18, at 888-98 (discussing gatekeeper liability and enforcement insufficiency).

37. See *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

38. See *Committee on Prof'l Ethics & Conduct v. Crary*, 245 N.W.2d 298, 305-06 (Iowa 1976) (holding that an attorney cannot knowingly permit his client to lie at a deposition hearing, especially if he has personal knowledge of the falsity).

39. See *Doe v. Federal Grievance Comm.*, 847 F.2d 57, 63 (2d Cir. 1988) (reversing the trial judge's determination that the lawyer had such an obligation).

40. See *United States v. Long*, 857 F.2d 436, 443-47 (8th Cir. 1988) (giving a defense attorney leeway in presenting a client's testimony which he suspected to be false).

client is lying will usually be protected by the attorney-client privilege. Hence, a court ordinarily can determine that the advocate knew that the client's testimony would be false only on the basis of circumstantial evidence. The principal circumstantial evidence will be the incredible character of the client's testimony. However, if the client's testimony is inherently incredible, then there is minimal added value in making the advocate a gatekeeper. Put simply, when a client's fabrication is so obvious that counsel must be held to know that it is such, then the fabrication probably will also be obvious to the trier of fact.

Judges do not show similar solicitude for presentation of false evidence in civil cases. The reason behind the differentiation is not difficult to discern. The very fact of criminal prosecution means that an accused has been designated by official authority—the prosecutor—as a semi-outlaw. The accused in the criminal case is therefore in special need of counsel. A civil claim does not have a similar imprimatur of public authority and therefore does not imply similar ostracism. Accordingly, there is a good case that the balance between candor to the court and loyalty to the client should be struck differently for a criminal defense attorney than for other advocates.

However, Judge Frankel's analysis reminds us that the problem of viewpoint has more subtle dimensions. Plainly stated, every trial submission by an advocate is a compromise between candor to the court and loyalty to the client. If the advocate's duty was really that of complete candor, and if such a duty actually reposed in advocates on both sides, then a trial would be akin to making line-calls in polite tennis; intervention by the referee will be required only when one of the participants was not in a good position to observe the transaction as it unfolded.

A trial in the adversary system, however, lacks such a quality. Rather, it is a set of productions, orchestrated by opposing counsel, of alternative narratives about the transaction in dispute. Neither narrative can properly be taken as unqualifiedly true. Indeed, the realization that party accounts cannot be taken as unqualifiedly true is the premise of the adversary system. Judge Frankel goes even further and suggests that, because the parties have collateral motives for distorting the facts, even as they understood them, often neither narrative is unqualifiedly true, even in terms of the partisan interests of the parties.⁴¹ Chief among the motives is to present oneself as a good and competent person. It is

41. See Frankel, *supra* note 35, at 1035.

notorious, for example, that witnesses reconstruct background facts that they did not observe but which they imagine that they should have observed. Counsel calculates how far to support this inclination on the part of their witnesses, realizing both the need to produce an adequate narrative and the risk that it will become an unbelievable caricature. According to Judge Frankel's analysis, a trial is a competition of versions not only to be discounted by the factor of interest in the outcome, but also by the recognition of psychological needs having no direct relevance to the matter under consideration.

These circumstances yield narratives at trial that are more or less equally unbelievable. A mentor of Judge Frankel's and mine, Professor Jerome Michael of Columbia Law School, long ago made this point in a somewhat different way. Professor Michael suggested that a case submitted to the jury, being by definition one which can rationally be decided either way, must by the same token be one that cannot be decided by reason.⁴² In my opinion, the same can be said for cases where the critical issue is one of law, which, by definition, cannot be resolved simply by reference to the text of standing law.

Modern system analysis provides explanation for this phenomenon. Although most cases are susceptible to rational disposition, these cases are often the ones that settle. Most advocates are not fools, and hence can recognize cases where the risk of losing is too high. Most clients are susceptible to persuasion by their counsel. This leaves for adjudication only those that are rationally intractable. A process of Darwinian selection of cases for trial thus produces the small subset seen by Marvin Frankel when he was a judge.

For this subset of cases presented to a judge, the tribunal's function is not unlike that of a reader of Durrell's *Alexandria Quartet*; that is, by creative imagination, drawing upon undisputed elements of the presentations, and working from inadvertently deposited clues in the conflicting narratives, the trier of fact invents its own narrative. That narrative is treated as fact by the legal system.⁴³ These artifacts of legal process are the premises upon which normative argument, deliberation, and decision can proceed.

Everyone who seriously ponders the system of administered justice wishes that we could get beyond this veil and find the truth. Such a wish

42. See Jerome Michael, *The Basic Rules of Pleading*, 5 RECORD 175, 199-200 (1950).

43. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

seems to have inspired my friend Frankel, as judge, to undertake his illuminating exposition. Perhaps reality compelled my friend to return to practice. The same wish apparently underlies the litany of disparagement of the adversary system in contemporary legal writing.⁴⁴ But a similar irreconcilable gap between truth and discrepant narratives exists in the other basic model of adjudication: the investigatorial model of the civil law system.⁴⁵

I have no unblinking admiration for the adversary system. For example, that system is not used in discourse over conflicts within a family or a law firm. Nevertheless, a system of administered justice is not simply discourse; it is certainly not a market transaction. Instead, administration of legal justice entails a basic element of governmental coercion.⁴⁶ The specter of coercion confronts every litigant and, consequently, every advocate. The specter of exercising coercion on the basis of imperfect knowledge confronts every judge. That is an irreducible difference in viewpoint.

VI. THE LEGAL COUNSELOR

In apposition to the role of "advocate," conventional terminology for lawyer roles uses the term "counselor."⁴⁷ However, I feel it more appropriate to use the term "transactional lawyer."

In the first place, it is relatively unusual for a lawyer to be simply a legal counselor, that is, to be engaged merely in giving advice to a client. Advice as such is simply a statement about how the client might proceed. But advice generally takes the form of guidance that is implicit in the lawyer's taking steps to further a transaction. Even advice in the form of an opinion letter usually is given only in anticipation of a subsequent need to present documentary proof that the client undertook a challenged course of action on the basis of such advice. In that context, the opinion letter is a legally operative document much like an accountant's audit report. It is created against the possibility that the opinion can usefully be shown to some third party. Hence, an opinion

44. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

45. See GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* (1993).

46. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1616 (1986).

47. Thus, the terms "counselor" and "advocate" are used respectively for the applicable provisions in the Model Rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.1-3, 3.1-9 (1992).

letter constitutes not merely advice, but an act of assistance to the client.

Even more distinctly, legal advice is most commonly provided in connection with, or in the form of, other assistance to the client. Incorporating a venture rather than organizing it as a partnership, for example, embodies legal advice even if the basis of the choice is not expressly conveyed to the client. Inclusion or exclusion from a disclosure statement of a debatably material fact is similarly an act of assistance embodying advice. So too is documentation of a testamentary disposition or preparation of a proposal in negotiation. Like an opinion letter, a legally significant document is an operative ingredient of a transaction.

The propriety of simply giving legal advice is constrained only by minimal limitations. The rules of professional ethics prohibit a lawyer from "counseling" conduct that is criminal or fraudulent.⁴⁸ The comment to the relevant Model Rule states: "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."⁴⁹

The law of civil liability for complicity in a client's conduct may go further than crimes or fraud. Some authorities contend that the prohibition extends to counseling other "illegal conduct."⁵⁰ However, it seems clear that counseling a client about breaching a contract does not result in liability for interference with contract, although a lay person might be liable in such circumstances.⁵¹ In any event, the operative verb remains "counseling."

In order to interpret the verb "counseling" one must resort to general legal parlance concerning complicity in another's illegal act. In that terminology the term signifies a specific purpose to further another's purpose, that of a client.⁵² I will leave to others the problem of distinguishing analytically or empirically between such a purpose, on the one hand, and the "mere awareness" that the client is likely to take account of the lawyer's advice, on the other hand. My own view is that the

48. See *id.* Rule 1.2(d).

49. *Id.* Rule 1.2 cmt.; see also Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) (discussing the lawyer's role in providing lawful assistance to a client who uses such assistance to carry out illegal activity).

50. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 703-05 (1986).

51. See Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981) (discussing the lawyer's role in providing lawful assistance to a client who uses such assistance to carry out an illegal act).

52. See MODEL PENAL CODE § 2.06(3) (1985).

distinction is like many other distinctions that are clear in concept but ineffable as a matter of proof. We adhere to the distinction in conceptual discourse, but in administration we consign it to a jury as an issue of fact.

Ordinarily, however, counseling about a transaction that entails legal risk proceeds to assistance in such a transaction. The relevance of this next step is apparent: providing assistance to a client's criminal or fraudulent enterprise constitutes aiding and abetting under criminal law and constitutes tortious conspiracy under the law of civil liability.⁵³ The law determining criminal or civil complicity applies to the conduct of a lawyer who assists in a transaction.⁵⁴

Another way of stating this proposition is that the normal course of a legal counselor's professional work, as distinct from the normal course of an advocate's professional work, is governed by a body of law that imposes liability for complicity in engagements that turn out to entail crime or fraud. Under modern law, many transactions that go beyond safe territory are defined as crime or fraud. Moreover, perhaps more so today than in the past, a high premium for clients attaches to transactions that go as close as possible to the bounds of the law.⁵⁵ Accordingly, the transactional lawyer ubiquitously faces risk of legal complicity in transactions that go as close to the line of legality as is invited by the prospect of client profits.

The viewpoint of a transactional lawyer concerning a legally questionable transaction is very different from that of an advocate or a judge. For an advocate, a legally questionable transaction is simply another case even when it involves the conduct of a lawyer. To be sure, an advocate prosecuting a case against a fellow attorney may have mixed emotions running from disgust to regret. An advocate for such a defendant may well come to believe that the client was a poor sap, hoodwinked by a malfeasant client. In either event, the advocates will consider such a case as a problem of presentation in court. The essential

53. See N.Y. PENAL LAW § 20.00 (McKinney 1987 & Supp. 1997) (imposing criminal liability on an accomplice for intentionally aiding another to engage in criminal conduct, while at the same time acting with the required mental culpability of the underlying offense).

54. See Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 276-77 (1984); Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct*, 19 S. ILL. U. L.J. 343, 345-47 (1995).

55. This proposition is implicit in the formula in the Code of Professional Responsibility that requires a lawyer to "represent his client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1986). Transactional lawyers have always felt very uncomfortable with this formulation.

problem for the lawyer's advocate is estimating the chance of persuading a trier of fact that someone else was the mastermind of the transaction, and the lawyer was merely an innocent instrument of a perfidious client. These days, the chances of success in such an endeavor are less than when members of our profession were considered *prima facie* honorable persons. Nevertheless, the task for the advocates and their orientation to the case are not much different from other cases involving allegations of white-collar wrongdoing. When the chance of success looks poor, the case should be settled, if possible.

From the judicial viewpoint, a case involving the conduct of a lawyer is also much like any other case involving fraud or breach of trust. Therefore, such a case is likely to be complicated and involves a great deal of documentary evidence, making matters even more difficult for a jury. The case typically will involve explanations by the accused that are extensive and verbally facile, whether credible or not. The pre-trial process, particularly discovery in civil cases, will be protracted. However, these characteristics are familiar in modern litigation.

Until recently, many judges seem to have had difficulty with the idea that reputable lawyers are capable of helping a client by illegal means.⁵⁶ That naiveté is currently receding. Hence, a transactional lawyer facing a plausible claim of complicity in client fraud is in a legally dangerous situation. Juries are mistrustful, and lawyers can no longer count on professional sympathy from the bench.

The transactional lawyer, unlike the advocate or the judge, functions inside the law's system of governance rather than outside of it. Every conflict check entails risk of a subsequent claim of improper conflict of interest, while entailing present risk of losing a potential client. Every disclosure determination entails risk of a subsequent claim that material information was withheld, while also entailing present risk of offending a client. Every joint representation—such as estate planning for husband and wife—entails risk of a subsequent claim of favoritism and nondisclosure.⁵⁷ The same holds true for organizing business ventures for multiple

56. See, e.g., *Schatz v. Rosenberg*, 943 F.2d 485, 496-97 (4th Cir. 1991) (holding that the plaintiff's claim that the seller's attorneys "substantially assisted" the seller in a securities violation must fail, where the attorneys "merely . . . put into writing the terms" to which the parties agreed); *Commonwealth v. Stenhach*, 514 A.2d 114, 123-24 (Pa. Super. Ct. 1986) (holding that the appellant attorney's retention of physical evidence while representing a defendant in a murder trial was not proper under existing law, but ultimately finding the statutes under which they were convicted to be unconstitutionally overbroad as applied to criminal defense attorneys).

57. For a discussion of ethical concerns relating to joint representation in estate planning, see Thomas L. Shaffer, *The Family as a Client—Conflict or Community?*, 34 RES GESTAE 62 (1990);

clients where there is the risk that the clients will be exasperated if it is insisted that they be separately represented.⁵⁸

If the transaction is called into legal question, the transactional lawyer will not be organizing a forensic production for a judicial appraisal, as is the function of the advocate. Instead, the transactional lawyer's conduct will be the very subject of judicial appraisal. The appraisal will be conducted through the mechanism of counterpoised productions by advocates acting for and against the transactional lawyer.

Most transactional lawyers have absorbed the gallows humor about litigation that is the small talk of their colleagues in the trial bar. Indeed, it is often revulsion to the gambling-table aura of litigation that leads transactional lawyers to pursue their specialties in the law. The trial mechanism, as understood by the typical transactional lawyer, epitomizes arbitrariness, an understanding for which Judge Frankel's analysis provides support.⁵⁹

The anxieties generated by these conditions translate into the heightened concern by law firms about civil liability. Malpractice liability coverage is no longer a professional bagatelle. "Loss prevention" programs are standard practice. Internal peer review is a precaution increasingly employed. Preparing memoranda for the file is strongly encouraged, so too are letters to clients on matters that formerly were covered orally or by tacit assumption. Corporate forms of firm organization, with limitation on individual responsibility for liability of other lawyers, have become legitimate.

Trial lawyers often speak of the forensic arena as "the pit," referring to the pit where cockfights are held.⁶⁰ A transactional lawyer looks at

Mercer D. Tate, *Handling Conflicts of Interest That May Occur in an Estate Planning Practice*, 16 ESTATE PLANNING 32 (1989).

58. See, e.g., John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 743 ("Lawyers commonly represent multiple clients with potentially conflicting interests without carefully considering the ethical implications because clients often demand common representation of their interests.").

59. See Frankel, *supra* note 35, at 1031 (arguing that our adversary system rates truth too low among the values that our justice system is meant to serve).

60. See, e.g., William Domnarski, *The Autobiographical Lawyer*, 19 J. LEGAL PROF. 165, 169-70 (1994-1995).

"[I]t is my courtroom, my judge, my jury . . . and when the jury says no . . . they are saying no to all of me since I have put all of me in the pit. . . . When I walk out of a courtroom with the jury's verdict I never feel joy at such triumphs, just relief, and I know that my reward for having won that gunfight is to be thrown into another pit alive to fight again."

Id. (quoting GERRY SPENCE & ANTHONY POLK, GUNNING FOR JUSTICE 15, 17 (1982)).

the pit from the viewpoint of one of the chickens.

VII. THE LEGISLATOR

All these versions of experience are true in some sense. Certainly they are true in the vivid subjective sense in which life is actually encountered, as in the *Alexandria Quartet*. Accordingly, the legislative function—the task of formulating the law that governs lawyers—must take all these versions into account. Among my most enlightening professional experiences are those that involve this task—as drafts person for the Rules of Professional Conduct, the Code of Judicial Conduct, and now monitor of the American Law Institute project for the Restatement of the Law Governing Lawyers.

As my colleague Professor Susan Koniak has written, practicing lawyers have persistently sought to interject their version of reality into the rules of lawyer ethics.⁶¹ It is well documented that advocates in the bar had decisive influence in limiting the authority of a lawyer to disclose client wrongdoing.⁶² Ironically, that influence was effective notwithstanding the limitations detrimentally imposed on transactional lawyers. One might say that judges have had similar influence on the rules that govern them, i.e., judicial opposition to peremptory challenge of judges.

There can be no complete transcendence of viewpoint in formulating the law that governs lawyers. There is no legal Mount Olympus on which legislative scribes can ensconce themselves. However, an attempt must be made to view the problem of the lawyer's response to client fraud and other wrongdoing in terms of the various perspectives I have sketched. Accordingly, we might consider the following possibilities:

1. Distinguishing more sharply than under the present law the function of advocate and the function of transactional lawyer. The present law appropriately makes a sharp distinction between the function of judge and the function of advocate. Indeed, they govern these two roles with different codes.

61. See Koniak, *supra* note 5, at 1391 ("There is a continuing struggle between the [legal] profession and the state over whether the profession's vision of law or the state's will reign. . . . [T]he legal profession does maintain a strong competing normative vision and that it struggles with the state to assert the primacy of that vision.").

62. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 702-03 (1989) (reporting that members of the bar actively protested the August 1979 draft of the Model Rules in order to protect client confidentiality).

2. Distinguishing the function of criminal defense counsel from other advocate roles. I have come to the view that requiring a criminal defense lawyer to "blow the whistle" on client perjury is futile or counterproductive. The law already recognizes a distinction between the duties of a prosecuting attorney and those of defense counsel in criminal cases. The distinction I am suggesting would simply carry the differentiation a step further.

3. Imposing more definite duties of candor on advocates in civil cases. Such a step could follow from differentiating the duties of prosecution and criminal defense counsel from those of advocates in civil cases. An interesting step in this direction has been taken in the recent New York rules governing disclosure of financial information in divorce litigation.⁶³ The Federal Rules of Civil Procedure now have an experimental provision requiring affirmative discovery in civil cases.⁶⁴ I have serious doubts about the specific formulation of this requirement, but not about the underlying concept. That is, it can be imagined that counsel in a civil case should be required to disclose at the discovery stage the substance of all testimony and documentary and other real evidence to be offered at trial on penalty of exclusion of evidence that was not so disclosed. It can be further imagined that counsel in civil cases could be required to make a personal certification covering the search made in response to demands for documents and other real evidence. Transactional counsel in securities cases presently have a comparable duty under the rubric of "due diligence."⁶⁵

4. Differentiating the functions of transactional lawyers. For example:

- The duty to refrain from assisting a client in criminal or fraudulent transactions could be made more exacting. A contemporaneous memorandum of fact and law about the legality of a transaction could be required in every seriously questionable transaction in which a lawyer provides assistance.

- The duty to avoid conflict of interest could be reinforced by a requirement—as now exists under California law—of written consent

63. See N.Y. DOM. REL. LAW § 236(B)(4) (McKinney Supp. 1997) (providing that "[i]n all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states").

64. See FED. R. CIV. P. 26(a).

65. See, e.g., Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability under Section 11 of the Securities Act of 1933*, 1996 WIS. L. REV. 217, 229-30 (outlining the various steps involved in the "due diligence" process).

by the clients to a conflict of interest.⁶⁶

- The duties of corporate counsel set forth in Model Rule 1.13 could be tightened, for example, by requiring a stricter referral of legally questionable substantial transactions to the board of directors or a special committee of the board.

- It could be made clearer that client fraud against the government, including material nondisclosure in tax reporting, is not any less of a fraudulent act simply because the victim is the government.

- It could be required that a lawyer assisting in preparation of a document submitted to an opposing party or to a government agency affirm that he knows no facts inconsistent with those stated in the submission.

Proposals such as these may be burdensome, but, in light of their potential benefits, they are not unreasonable.

VIII. CONCLUSION

The foregoing suggestions for modification of the law governing lawyers are illustrations, not recommendations. They illustrate the proposition that it is quite possible to make sharper distinctions between the functions of advocate and transactional lawyer, as we have made between the functions of lawyer and judge, and to demand more of lawyers in their function as gatekeeper to the marketplace and in interfaces with the government. It is, of course, unfashionable these days to consider the possibility of more exacting regulation. Nevertheless, more exacting requirements on the legal profession could facilitate less exacting ones on the clients.

There is no vantage point from which we can make perfect rules. However, there are amendments that can be more seriously considered if we take into account the various perspectives of lawyers in different positions in the legal system.

66. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-310(A) (1994) (providing that in a conflict of interest situation, a lawyer "shall not accept or continue . . . representation without all affected clients' informed written consent").

